

STATE OF MICHIGAN
COURT OF APPEALS

PETER J. LOVATO,

Plaintiff-Appellant/Cross-Appellee,

v

MARION E. LOVATO,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

April 17, 2014

No. 314222

Mason Circuit Court

Family Division

LC No. 11-000294-DM

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

In this divorce action, plaintiff, Peter J. Lovato, appeals as of right the judgment of divorce entered by the trial court, challenging the trial court's findings as to property valuation, property division, spousal support, and attorney fees. Defendant, Marion E. Lovato, cross-appeals, also challenging the issues of property valuation and attorney fees. For the reasons stated below, we affirm.

Plaintiff first challenges the property division and valuation of real property known as "the Barnhart property." When reviewing a judgment of divorce, we first review for clear error the trial court's findings of fact, and then determine "whether the dispositive ruling was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). A factual finding is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake was made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). We should affirm the trial court's dispositive ruling "unless we are left with the firm conviction that the division was inequitable." *Sparks*, 440 Mich at 152.

Plaintiff argues that the trial court clearly erred by valuing the property at \$412,000. We disagree. The parties placed the house on the market in July 2012 for \$475,000, with an agreement to not sell it for less than \$425,000. However, real estate agent Mary Jo Pung thought that the house should be listed at \$445,000, and her market analysis of the property indicated a value of \$398,000. Finally, the summer 2011 taxes show the state equalized value at \$209,200, which would indicate a value of \$418,400. The trial court's valuation of \$412,000 for the property is within the range of values established by the proofs, and therefore, is not clearly erroneous. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994) (stating that

“where a trial court’s valuation of a marital asset is within the range established by the proofs, no clear error is present”).

Plaintiff also argues that the trial court erred by failing to consider the full amount of debt associated with the property, when calculating the property’s value. We disagree. It is the trial court’s role to distinguish between marital property and separate property when distributing property in a divorce. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The marital estate that is to be divided equitably among the parties generally consists of the marital property alone, and not the parties’ separate property. *Id.* at 494. This Court has stated that “it does not matter if the division of the entire holdings appears one-sided, what is important is the division of the *marital* estate.” *Id.* at 497 (emphasis added). In this case, plaintiff was awarded the Barnhart property, and there is no dispute that this is marital property. The judgment of divorce clearly reflects that the trial court properly considered the marital debt associated with that marital property. The evidence shows that the Barnhart property was encumbered by the original mortgage owing to Wells Fargo, with a remaining balance of approximately \$95,000,¹ a PNC Bank home equity loan of \$160,000, and a loan from Butler Capital, with a remaining balance, at the time of trial, of approximately \$82,000.² In the judgment of divorce, the trial court expressly stated that the Wells Fargo and PNC debts were “marital debt,” and the trial court awarded plaintiff the Barnhart property subject to that debt.³ Thus, contrary to plaintiff’s argument, it appears the trial court did consider these two debts when calculating the net value of the marital property. With regard to the \$82,000 Butler loan, the trial court properly determined

¹ At trial, it was estimated that the mortgage balance was approximately \$97,610, but the judgment of divorce indicates that it had decreased to approximately \$95,000. We use the latter value when computing the value of the property.

² The marital home, known as “the Decker property” was also used as security for the Butler Capital loan, which was a loan taken out by PL Squared.

³ We note that in its opinion following the trial, the trial court found that \$115,000 of the PNC home equity loan was used to invest in the Subways; however, the remaining \$45,000 was unaccounted for. Defendant contended that the \$45,000 should be considered a marital asset and divided equally. The trial court determined that based on the parties’ spending habits, and the fact that the transaction occurred seven years prior to the divorce filing, it was reasonable to conclude the money was spent on miscellaneous family expenses. The trial court concluded that the proceeds from the PNC home equity loan were “not marital assets to be divided and shall not be considered in the property settlement calculations. The \$115,000 is reflected in the appraisal value of the Subways and the Defendant is sharing in the division of this asset.” Thus, it appears that although the trial court concluded that the proceeds were not a marital asset to be calculated in the property settlement, it determined in the judgment of divorce following its opinion, that the \$160,000 loan was a marital debt, and we find no error in this determination. As noted, the loan was taken out by both parties against marital property and part of it was used for marital expenses. The remaining proceeds were used as start-up funds for the Subway franchises, which testimony showed were started as an investment to supplement the family’s income to help pay for the children’s college education.

that this was a separate business debt, attributable solely to plaintiff and his brother as owners of PL Squared, and as such, the court did not err in omitting it from the division of the marital estate.

Plaintiff additionally argues that the trial court erroneously awarded the property to plaintiff. Plaintiff argues that the trial court should have ordered that the property be sold and the net proceeds divided equitably. We disagree. Although plaintiff testified that he preferred to sell the property because he needed the proceeds to pay defendant the property equalization amount, there was evidence to support the trial court's conclusion that the parties had agreed that defendant would receive the Decker property, the Barnhart property was more valuable to plaintiff than it was to defendant, and the failure to assign the asset would result in further litigation and costs between the parties given their differences of opinion regarding an appropriate sale price, as well as their inability to work together during the divorce proceedings. Thus, we conclude that in light of the circumstances, the disposition of the Barnhart property to plaintiff was fair and equitable.

Plaintiff next argues that the trial court erred by awarding defendant a property equalization amount of \$192,633.19. We disagree. The division of marital property does not have to be equal, but it must be equitable. *Jansen*, 205 Mich App at 171. Generally, an equitable distribution of marital assets is one that is "roughly congruent." *Id.* We first reject plaintiff's argument that the equalization award was erroneous due to the miscalculation of the value of the Barnhart property, because as discussed, we found no error in the trial court's valuation of that property.

Plaintiff also asserts that the equalization award was not supported by the evidence. However, a review of the record indicates otherwise. The trial court adopted the marital property chart⁴ submitted by defendant at trial in the judgment of divorce to aid in determining values and distribution of the marital property. Based on the judgment of divorce and property chart, it appears plaintiff received the following marital assets: (1) the Barnhart property, with a value of \$157,000;⁵ (2) his pension, with a value of \$50,960; (3) his 401(k), with an approximate value of \$156,601; (4) his two life insurance policies, with an approximate combined value of \$36,863; (5) miscellaneous personal property, with an approximate value of \$3,878; and (6) the Subway franchises, with a value of \$517,000. Plaintiff was also responsible for approximately \$1,968 in marital credit debt,⁶ bringing his total value of marital property to \$920,334.

⁴ Plaintiff asserts that the values in this chart were incorrect, but offers no evidence to the contrary. Therefore, this argument is abandoned. See *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012).

⁵ The net value of the Barnhart property was calculated by subtracting the marital debt associated with the property, which included the Wells Fargo and PNC debts, from the value the trial court assigned the property.

⁶ Plaintiff was also required to pay defendant \$1,339.94 for credit card charges that he made on defendant's credit cards after the parties separated. It appears the trial court excluded this from

With regard to defendant, the record indicates she received the following marital property: (1) the Decker property, with a value of approximately \$56,944;⁷ (2) her 401(k), with a value of \$407,656; (3) her IRA, with a value of \$11,974; (4) her life insurance policy, with an approximate value of \$20,346; and (5) miscellaneous personal property, with an approximate value of \$24,020. Defendant was also responsible for approximately \$1,968 in marital credit card debt, bringing her total value of marital property to \$518,972. Thus, plaintiff received \$401,362 more in marital assets than defendant. Accordingly, an equalization payment of approximately \$200,681 would be needed to balance the parties' property awards. The judgment of divorce reflects that the trial court originally awarded defendant an equalization amount of \$200,633.19, which, as indicated, is approximately the amount needed to balance the parties' property awards. However, in an amended order, the trial court reduced that amount by \$8,000 to account for the 2010 income taxes that plaintiff paid with his own credit card. The trial court determined that the income-tax debt arose because of the income generated from the Subway franchises, and because defendant was receiving a 50 percent share of the equity in the business, the trial court determined that plaintiff should receive credit for half the debt, or \$8,000, and as such, it reduced defendant's equalization amount by \$8,000. Neither party challenged this determination.

Thus, a review of the evidence shows that the trial court attempted to divide the assets equally, but given the nature of the assets, plaintiff received more. To reconcile the difference, the court awarded defendant an equalization amount of \$192,633.19, which, as discussed, was approximately one-half the difference between the awards. This created a proper balance in the awards, and therefore, we find this distribution to be equitable.

Plaintiff next argues that the spousal-support award was inequitable. We review a trial court's decision to award spousal support for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). The trial court abuses its discretion when its decision "falls outside the range of reasonable and principled outcomes." *Id.*

Specifically, plaintiff argues that the trial court failed to impute income to defendant, given her ability to earn more. We disagree. Under certain circumstances, the voluntarily unexercised ability to earn income may be considered. *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000); *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). Specifically:

A trial court would not abuse its discretion by awarding alimony on the basis of a party's ability to pay where that party has voluntarily reduced his or her income so as to avoid paying alimony. This protects a dependent spouse from impoverishment when the other spouse reduces his or her income out of spite or in simple avoidance of future support. [*Healy*, 175 Mich App at 191.]

the marital property calculations, given that the charges were made after the parties separated, and without defendant's knowledge or permission. We find no error in this determination.

⁷ The net value of the Decker property was calculated by subtracting the marital debt associated with the property, which included a first and second mortgage to PNC Bank totaling approximately \$281,056, from the value the trial court assigned the property.

If the trial court finds that a party has voluntarily reduced the party's income the court may impute additional income to arrive at an appropriate spousal-support award. *Moore*, 242 Mich App at 655. In this case, there is no evidence that defendant voluntarily reduced her income to manipulate the award of spousal support. As acknowledged by both parties and recognized by the trial court, the parties' move from Chicago, Illinois to the smaller area of Ludington, Michigan was a joint marital decision made under the belief that it would provide a better quality of life for the children and they would be closer to relatives. Defendant acknowledged that she could earn more money in a different position, but that would require her to move, and she wanted to avoid uprooting the children after the divorce. Accordingly, the trial court did not err in failing to impute a higher income to defendant.

Plaintiff also argues that the spousal-support award was inequitable because the trial court erred by calculating his net income from American Trucking Associations at \$106,054, because it did not deduct for tax withholdings, health insurance, and 401(k) contributions. However, plaintiff fails to identify any authority supporting his position. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to either sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001) (quotation omitted). Further, this Court has made it clear that "there is no room for the application of any rigid and arbitrary formulas when determining the appropriate amount of spousal support." *Loutts v Loutts*, 298 Mich App 21, 30; 826 NW2d 152 (2012) (quotation marks and citation omitted). Rather, a trial court must do "what is just and reasonable under the circumstances of the case." *Id.* (quotation marks and citation omitted). Accordingly, plaintiff has failed to demonstrate how the trial court erred in this regard.

Plaintiff also argues that the \$35,000 from retained earnings in PL Squared should not have been included in plaintiff's income to calculate spousal support. We disagree. Plaintiff asserts that because Whitley Penn utilized the income approach to value in its valuation of PL Squared, the retained earnings attributed to him were already encompassed within the value of the asset for property distribution and attributing that amount to him for purposes of income calculation for spousal support constituted double-dipping. However, a review of Whitley Penn's appraisal indicates that it actually used a blended approach with 50 percent weighting applied to both the market approach to value and the income approach to value to arrive at its valuation of PL Squared. Thus, this argument lacks merit. Further, this Court held that "excess" income may be used to determine property division and spousal support, as long as the outcome is "just and reasonable." *Loutts*, 298 Mich App at 30-31. In this case, the trial court thoroughly discussed the facts and equities of the case as they applied to the 14 spousal-support factors. See *Id.* at 31. Plaintiff was awarded an income-producing asset, from which he has the discretion to take the equity distributions each year, and history shows that he has. Specifically, the trial court noted that "these payments are not guaranteed, however the reality is that for the last three years they have totaled \$95,308.00 (\$46,514 for 2010, \$29,294 for 2011 and \$17,500 thus far in 2012)." The trial court further found that defendant was not awarded any income-producing assets, her income was one-half of plaintiff's income, and her financial needs and obligations exceeded her income. The trial court determined that plaintiff's income allows him to enjoy a significantly higher standard of living, while defendant's income limits her to essential needs. The trial court has the discretion to require a party to invade his or her award of marital assets to

pay spousal support, especially when one party is well-established and the other is not. See *Torakis v Torakis*, 194 Mich App 201, 204-205; 486 NW2d 107 (1992). Accordingly, we conclude that the trial court's consideration of the \$35,000 retained earnings was just and reasonable under the circumstances, and its award of spousal support of \$1,500 a month was within the range of reasonable and principled outcomes.

Plaintiff further argues that the trial court abused its discretion by awarding defendant \$16,000 in attorney fees. We disagree. A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Attorney fees are authorized by statute, MCL 552.13(1), and court rule, MCR 3.206(C), in domestic relations cases. *Id.* "Attorney fees in a divorce action may be awarded when a party needs financial assistance to prosecute or defend that suit." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008) (quotation marks and citation omitted). A party should not be required to invade assets to satisfy an award of attorney fees when the party is relying on those same assets for support. *Id.* Under MCR 3.206(C)(2)(a), "[a] party who requests attorney fees and expenses must allege facts sufficient to show that . . . the party is unable to bear the expense of the action, and that the other party is able to pay."

There is sufficient evidence in the record to support a finding that defendant is unable to bear the expense of the attorney fees and that plaintiff has the ability to pay. Although the trial court did not make an express finding that defendant was unable to defend the action without an award of attorney fees, such a finding was implicit from its other rulings. *Kurz v Kurz*, 178 Mich App 284, 298; 443 NW2d 782 (1989). As discussed, plaintiff earns double the income of defendant and was awarded a significant income-producing asset. Additionally, the record establishes that defendant has incurred \$36,000 in credit card debt since the separation, she had to borrow \$20,000 from her parents and sister, and after the divorce, she would need to pay her own health insurance and buy a new car. Contrary to plaintiff's argument, although defendant has a sizeable 401(k), a party should not be forced to invade assets to pay attorney fees, particularly when the other party has the ability to pay and the assets are meant to provide a means of support. *Id.*

Conversely, defendant cross-appeals, arguing that the trial court erred by not awarding her the full \$35,000 in attorney fees she requested. However, as correctly noted by the trial court, plaintiff also has his own obligations—including the mortgage and home equity loan on the Barnhart property, and the remaining loans on the Subways—which influence his ability to fully pay defendant's attorney fees and expenses. In addition, the trial court clearly questioned the \$17,000.00 fee for a review of the Whitley Penn appraisal and defendant does not argue on appeal that this finding was erroneous. Accordingly, the trial court did not abuse its discretion by awarding defendant \$16,000 in attorney fees.

Finally, in her cross-appeal, defendant argues that the trial court erred by valuing the Subway franchise at \$517,000. Defendant argues that it should have been valued at \$550,000 per her expert, because that value better reflects the marital efforts that went into the business. We disagree. The record shows that plaintiff's appraiser, Whitley Penn, valued plaintiff's one-half interest in PL Squared at \$485,000, while defendant's appraiser, Robert Schellenberg, accepted the appraisal method used by Whitley Penn, but disagreed on two points used in the valuation (risk factor assigned to the business and discount applied for lack of marketability),

and valued plaintiff's interest at \$550,000. The trial court detailed the differences in the appraisals and recognized that the risk factor used to calculate the value of PL Squared was not precise. Thus, the court essentially split the difference down the middle by valuing the asset at \$517,000. Accordingly, the \$517,000 value was not clearly erroneous because it was within the value range established by the proofs. *Jansen*, 205 Mich App at 171.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan